No. 640

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HAROLD B. WILLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

ROCK DRILLING, BLASTING, ROADS, SEWERS, VIADUCTS, BRIDGES, FOUNDATIONS, EXCAVATIONS AND CONCRETE WORK ON ALL CONSTRUCTION, HOD CARRIERS', BUILDING AND COMMON LABORERS' LOCAL UNION NO. 17, *Petitioner,*

against

MASON & HANGER COMPANY, INC., *Respondent.*

ROCK DRILLING, BLASTING, ROADS, SEWERS, VIADUCTS, BRIDGES, FOUNDATIONS, EXCAVATIONS AND CONCRETE WORK ON ALL CONSTRUCTION, HOD CARRIERS', BUILDING AND COMMON LABORERS' LOCAL UNION NO. 17, *Petitioner,*

against

WALSH CONSTRUCTION COMPANY, INC., *Respondent.*

ROCK DRILLING, BLASTING, ROADS, SEWERS, VIADUCTS, BRIDGES, FOUNDATIONS, EXCAVATIONS AND CONCRETE WORK ON ALL CONSTRUCTION, HOD CARRIERS', BUILDING AND COMMON LABORERS' LOCAL UNION NO. 17, *Petitioner,*

against

B. PERINI & SONS, INC., *Respondent.*

ROCK DRILLING, BLASTING, ROADS, SEWERS, VIADUCTS, BRIDGES, FOUNDATIONS, EXCAVATIONS AND CONCRETE WORK ON ALL CONSTRUCTION, HOD CARRIERS', BUILDING AND COMMON LABORERS' LOCAL UNION NO. 17, *Petitioner,*

against

GEORGE M. BREWSTER & SON, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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against

MASON & HANGER COMPANY, INC., Respondent.

ROCK DRILLING, BLASTING, ROADS, SEWERS, VIADUCTS, BRIDGES, FOUNDATIONS, EXCAVATIONS AND CONCRETE WORK ON ALL CONSTRUCTION, HOD CARRIERS', BUILDING AND COMMON LABORERS' LOCAL UNION NO. 17, Petitioner,

against

WALSH CONSTRUCTION COMPANY, INC., Respondent.

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against

GEORGE M. BREWSTER & SON, INC., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit in the within actions, dated December 6, 1954, affirming orders of the United States District Court for the Southern District of New York, each dated May 23, 1950, dismissing the original complaint in each action, and orders of said District Court, each dated May 28, 1951, upon which final judgments were entered on May 29, 1951, dismissing the amended complaint in each action. The judgments of the Court of Appeals affirm so much of said orders as dismiss the original complaint and the amended complaint in each action for lack of jurisdiction.

The Consolidation of the Within Actions

Petitioner is filing a single petition for writ of certiorari covering all four of the within actions because the said actions were all heard in the same courts below and all involve identical questions of law and are based on substantially similar states of fact. The motions to dismiss the original complaint in each action were argued simultaneously, as were the motions to dismiss the amended complaint in each action. The District Court rendered but one opinion upon the motions to dismiss the original complaints in all four actions (R. 13, 43, 81, 113),[1] and but one memorandum opinion upon the motions to dismiss the amended complaints (R. 27, 65, 95, 129). The appeals to the Court of Appeals in all four actions were consolidated pursuant to stipulation (R. 133), were heard upon a single consolidated record, and were argued simultaneously. The Court of Appeals rendered but one opinion upon the consolidated appeal.

[1] References, unless otherwise noted, are to pages of the record on appeal in the Court of Appeals.

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Opinions Below

The opinion of the District Court dismissing the original complaints (R. 43) is reported at 90 F. Supp. 539. The memorandum opinion of the District Court dismissing the amended complaints (R. 27, 65, 95, 129) is not reported. The opinion of the Court of Appeals (Appendix I, *infra*) is reported at 217 F. 2d 687.

Jurisdiction

The judgments of the Court of Appeals (Appendix II, *infra*) were entered on December 6, 1954. Jurisdiction is conferred on this Court by 28 U. S. C. Section 1254.

Questions Presented

1. Does Section 301(b) of the Labor Management Relations Act of 1947 (29 U. S. C. Section 185(b), hereinafter referred to as the "Taft-Hartley Law") empower a labor union to maintain a tort action in a District Court of the United States against an employer on behalf of the employees represented by the union upon claims that inure to the benefit of such employees and that arise out of the collective bargaining relationship, provided the requisites of federal diversity jurisdiction are present?

2. Does Rule 17(a) of the Federal Rules of Civil Procedure empower a labor union that has entered into a collective bargaining agreement with an employer for the benefit of the employees represented by the union to maintain an action in a District Court of the United States, as a party with whom a contract has been made for the benefit of another, upon claims that inure to the benefit of such employees and that arise from injury sustained by such employees collectively as a result of the employer's fraud

in the making of the collective bargaining agreement, provided the requisites of federal diversity jurisdiction are present?

3. Where a labor union brings an action in a District Court of the United States as a statutory trustee pursuant to Section 301(b) of the Taft-Hartley Law against an employer on behalf of employees represented by the union upon claims that inure to the benefit of such employees, is the amount in controversy the total recovery sought by the union?

4. Where a labor union that has entered into a collective bargaining agreement with an employer for the benefit of the employees whom it represents brings an action in a District Court of the United States pursuant to Rule 17(a) of the Federal Rules of Civil Procedure as a party with whom a contract has been made for the benefit of another, upon claims that inure to the benefit of such employees and that arise from injury sustained by such employees collectively as a result of the employer's fraud in the making of such agreement, is the amount in controversy the total recovery sought by the union on behalf of the employees?

5. Where a labor union brings an action in a District Court of the United States (federal jurisdiction being based on diversity of citizenship) against an employer upon a cause of action arising under the laws of the State of New York to recover, on behalf of the employees of such employer whom it represents, a bribe paid by such employer to a former agent of the union in connection with the making of a collective bargaining agreement between the union and the employer establishing the terms and conditions governing the employment of such employees by the employer, and where, under the laws of the State of New York, it must be conclusively presumed as a matter of law that the employees were damaged collectively in at least

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the amount of the bribe, does the amount of the bribe constitute a fund in which the employees have a common and undivided interest and is the amount in controversy in such action the aggregate amount of the fund that the union seeks to recover?

6. Does the maintenance by a labor union, pursuant to Section 301(b) of the Taft-Hartley Law, of an action to recover on behalf of employees whom it represents claims based upon the substantive law of the State of New York, that inure to the benefit of such employees and that arose and were enforceable by such employees prior to the enactment of the Taft-Hartley Law, involve the retroactive application of a new substantive right?

Statutes and Rules Involved

Taft-Hartley Law Sections 301(a) and (b):

29 U. S. C. Section 185

SUITS BY AND AGAINST LABOR ORGANIZATIONS

(a) Suits for violation of contracts between an employer and a labor organization representing employees of an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organi-

zation as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Federal Rules of Civil Procedure:

Rule 17(a)

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.

28 U. S. C. Section 1332:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs and is between:

(1) Citizens of different States;

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) The word "States", as used in this section, includes the Territories and the District of Columbia.

Statement

The facts material to the consideration of the questions presented herein are set forth in the amended complaints, which are substantially similar in each action.

In each amended complaint the jurisdiction of the District Court is established by allegations of diversity of citizen-

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ship of the parties and an amount in controversy in excess of $3,000 (R. 15, 52-3, 82-3, 115).

In each case the petitioner, a labor union, is suing as a statutory trustee under Section 301(b) of the Taft-Hartley Law (R. 16, 53, 83, 115) and as party to a collective bargaining agreement (R. 18, 56, 85-6, 118) to recover damages from each of the four respondents who are the employers with whom each such agreement was made (R. 18, 56, 85, 118). The claim for damages in each action is predicated on the respondent's fraud in the making of the agreement by corrupting petitioner's agent, one James Bove (R. 18-21, 55-59, 85-88, 117-123). The gist of each action is that the respondent induced Bove, by paying him a bribe, to enter into a collective bargaining agreement on behalf of petitioner containing provisions under which employees of respondent represented by petitioner received less wages and worked under less favorable working conditions than they would have received and worked under but for the wrongful bribe (R. 18-21, 55-59, 85-88, 117-123).

In the *Walsh* case the bribe paid by the respondent employer to Bove was $212,000 (R. 19); in the *Mason & Hanger* case it was $36,000 (R. 56); in the *Perini* case, $25,000 (R. 186); and in the *Brewster* case, $45,000 (R. 119, 121).

In each action recovery is sought on behalf of respondent's employees who were represented by petitioner, who were third-party beneficiaries of the fraudulently procured agreement, and who rendered their services to respondent in accordance with the terms of the agreement (R. 19-20, 57-58, 86-88, 121-123). The sum sought to be recovered in each action is the amount of the bribe paid by each respondent to Bove (R. 20-21, 58, 88, 123), which is conclusively presumed under the law of New York to be the minimum aggregate damage suffered by the employees represented by petitioner as a result of the bribe paid by each respondent (see infra, p. 22).

The facts alleged in the original complaints (R. 4, 34, 72, 102) are also substantially similar in each action. The original complaints, however, differed from the amended complaints in two important respects:

1. In the original complaints petitioner did not sue (as it does in the amended complaints) as the promisee of contracts for the benefit of third persons to recover damages on behalf of the beneficiaries thereof. It sued only as a statutory trustee under Section 301(b) of the Taft-Hartley Law.

2. In the original complaints the recovery sought was not (as in the amended complaints) the fund represented by the amount of the bribe paid by each of the respondents. Instead, the damages sought in each action were the aggregate total of the individual tort damages sustained by each employee involved.[2]

The motions of respondents to dismiss the original complaints came on to be heard in the District Court before Judge Rifkind. In his opinion granting the motions (R. 43-51) Judge Rifkind rejected petitioner's construction of Section 301(b) of the Taft-Hartley Law and decided that Section 301(b) did not empower petitioner to sue as trustee on behalf of respondents' employees whom it represented to enforce individual damage claims belonging to such employees (R. 48-50). Accordingly, Judge Rifkind found that petitioner was not the "real party in interest" under Rule 17(a) of the Federal Rules of Civil Procedure (R. 50) and that, therefore, the complaints did not state claims upon which relief could be granted (R. 50). Judge Rifkind also went on to hold that the individual claims of the various employees could not be aggregated to achieve the requisite jurisdictional amount (R. 51-52). He therefore

[2] Thus, in the original complaint, the total damages sought against Walsh Construction Company, Inc. was $410,000; against Mason & Hanger Co., Inc., $600,000; against B. Perini & Sons, Inc., $120,400; and against George M. Brewster & Son, Inc., $435,000 (R. 8, 38, 75, 107).

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dismissed the original complaints (R. 52) but granted petitioner leave to serve amended complaints (R. 14, 52, 82, 114).

In the amended complaints petitioner again relied on Section 301(b) of the Taft-Hartley Law to sustain its position that it is empowered to maintain these actions as a statutory trustee. The amended complaints, however, contain the following elements that were absent from the original complaints:

1. Each alleges a claim based on petitioner's legal interest as promisee of a collective bargaining agreement (R. 18-20, 55-58, 85-87, 119-122) and which it is seeking to enforce for the benefit of the employee-third party beneficiaries of that agreement.

2. The measure of recovery sought in the amended complaint in each case is the amount of the bribe paid by the respondent. This amount constitutes a fund in which each respondent's employees represented by petitioner have a common and undivided interest, and which represents the minimum damage that such employees as a group are conclusively presumed to have sustained as a matter of New York law by reason of respondent's fraud in the execution of the agreement (see *infra*, p. 22).

The motions to dismiss the amended complaints were heard in the District Court before Judge Samuel H. Kaufman. In his memorandum opinion granting the motions (R. 27, 65, 95, 129), Judge Kaufman did not discuss petitioner's arguments but simply stated that the amended complaints did "not correct the defects found by Judge Rifkind as sufficient cause for the dismissal of the original complaint(s)".

Petitioner appealed to the United States Court of Appeals for the Second Circuit from Judge Kaufman's order in each case dismissing the amended complaint and from the judgment entered thereon, and also appealed from,

and brought up for review, the interlocutory order dismissing the original complaint in each case (R. 30, 68, 98, 131).

The Court of Appeals affirmed "so much of the orders appealed from as dismisses the complaint and the amended complaint [in each case] for lack of jurisdiction". Judge Medina's opinion of affirmance is printed as Appendix I, *infra*.

Reasons Why the Writ Should Be Allowed

The Court of Appeals has erroneously decided important questions of federal law, involving the meaning of federal statutes of wide application and of important provisions of the Federal Rules of Civil Procedure. These questions have not been, but should be, settled by this Court.

A

Section 301(b) of the Taft-Hartley Law empowers petitioner to maintain these actions "in behalf of the employees whom it represents".

Section 301(b) of the Taft-Hartley Law provides:

> "Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. *Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States.*" (Italics supplied.)

As the courts below recognized, the provision that "any such labor organization may sue or be sued as an entity * * *" is a capacity provision pursuant to which a union that represents employees in an industry affecting commerce may sue or be sued in its common name on *all* causes of action over which the federal courts have jurisdiction.

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rather than, as formerly, only on causes of action arising under the laws of the United States (see Rule 17(b) of the Federal Rules of Civil Procedure).

In holding that Section 301(b) does not empower petitioner to maintain this action, however, the courts below have, in effect, nullified the provision of the section authorizing "any such labor organization" to "sue or be sued * * * in behalf of the employees whom it represents * * *." For that provision is entirely superfluous to the purpose of investing unions with the capacity to sue and be sued in their common names. If it has any meaning at all, it means that a union may sue as a statutory trustee in the courts of the United States (provided the requisites of federal jurisdiction are independently present) to enforce claims accruing to the employees it represents where such claims arise out of the collective bargaining relationship.

In rejecting this construction the courts below were moved by the fears that to hold that a union may sue to enforce such claims of the employees whom it represents would constitute a novel and radical departure in the law, and would give rise to a host of legal difficulties. These fears, we submit, were not well founded.

Section 301(b) is a part of a comprehensive statute—the Labor Management Relations Act of 1947—which deals with labor management relations and which, from beginning to end, empowers unions to act for employees represented by them in a variety of different situations. Both under the Taft-Hartley Law and under the Wagner Act which preceded it, it was recognized that the right of a union to act as the representative of employees in dealing with employers in labor relations is a necessary and correlative right flowing from the right of employees to act through representatives of their own choosing.

Accordingly, under both the Wagner Act and the Taft-Hartley Law unions have always been permitted without question to act for employees not only in collective bar-

gaining and in filing petitions for certification of representatives, but also in filing charges on behalf of individual employees and obtaining directive orders, enforceable in the courts, for the payment of moneys to such employees.[3] And this despite the fact that neither act contains any provision expressly authorizing such action by unions on behalf of employees.

By virtue of their status as the collective bargaining representatives of employees, unions have for many years also been accorded the right to enforce the individual claims of such employees arising out of the collective bargaining relationship under various other statutes and in various other proceedings. Thus, despite the absence of express statutory authority, the right of unions to prosecute proceedings before the National War Labor Board under the War Labor Disputes Act (50 U. S. C. Sections 1501-1511) was recognized without question; and these proceedings frequently led to awards of substantial sums of money to individual employees (see, e.g., *In re Metropolitan Life Insurance Company,* 20 War Labor Reports 741, aff'g 11 War Labor Reports 562). Similarly, where statutory proceedings have been established as substitutes for free collective bargaining union representation of employees in the institution and prosecution of such proceedings is the universal rule.[3a] Arbitrations to protect the rights of indi-

[3] See, for example: National Labor Relations Act, 29 U. S. C. Sections 151 et seq.; New York State Labor Relations Act, New York State Labor Law Sections 700 *et seq.; National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1; *National Labor Relations Board* v. *Fruehauf Trailer Co.,* 301 U. S. 49; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.,* 301 U. S. 58; *Consolidated Edison Company of New York* v. *National Labor Relations Board,* 305 U. S. 197.

[3a] See, for example: Laws of Florida, 1947, General Laws, Vol. 1, Chapter 23911 (No. 297), House Bill No. 954, page 577; Laws Missouri, 1947, Vol. 1, Sixty Fourth General Assembly (H. B. 180), page 358; New Jersey Statutes Annotated, Permanent Edition, Title 34, Labor and Workmen's Compensation, 1947 Cum. Annual Pocket Part, Chapter 13B, page 54; Laws of Wisconsin, 1946-1947, Chapter 414, No. 91 S, page 713.

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vidual employees under collective bargaining agreements are conducted by unions as a matter of course; and unions also act as the representatives of individual employees in court suits to compel the arbitration of claims of such employees[4] and to enforce arbitration awards directing the payment of money damages to such employees.[5] Indeed, union representation of employees upon claims inuring to the benefit of such employees arising out of the employment relationship has also been sustained in a variety of court actions not involving arbitration awards.[6]

The Labor Management Relations Act of 1947 was plainly designed, among other things, to give broad statutory sanction to the already well recognized rights of unions to act on behalf of the employees represented by them in the enforcement of the individual claims of such employees arising out of the collective bargaining relationship. Under Title I of the Act the right, which existed under the Wagner Act, of unions to represent employees in Board proceedings, including proceedings to compel the payment of money to individual employees, is recognized and continued. Under Title II of the Act, relating to conciliation and voluntary arbitration of labor disputes, the accepted practices in conciliation and arbitration proceedings, including the prosecution by unions of claims inuring to the benefit of individual employees, were codified and confirmed. Title III, which relates to "suits by and against labor organizations", rounds out the picture by providing in Section 301(b) that unions shall have the power (theretofore not recognized in many courts) not only to sue and be sued in their common names in actions in the courts, but also

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[4] See, for example: *Matter of Lane*, 274 App. Div. 833, aff'd 299 N. Y. 725; *Matter of Swift & Co.*, 76 N. Y. S. (2d) 881.

[5] See, for example: *Matter of United Culinary Bar & Grill Employees, Local 923*, 272 App. Div. 491, aff'd 299 N. Y. 577; *Matter of Devery*, 266 App. Div. 213, aff'd 292 N. Y. 596.

[6] See, for example, *Empire Case Goods Workers Union* v. *Empire Case Goods Company*, 271 App. Div. 149.

to bring suits *for individual employees represented by them.*

1. *Ample authority already exists for petitioner's construction of Section 301(b) of the Taft-Hartley Law.*

Many years prior to the enactment of the Taft-Hartley Law a labor union was permitted to sue in a federal court to enforce the claims of individual employees represented by it pursuant to a statute similar to Section 301(b) (*Local Union No. 497, etc.* v. *Joplin & P. Ry. Co.*, 287 F. 473 (C. A. 8th)). And under the Taft-Hartley Law itself the power of unions to prosecute the individual damage claims of employees in suits for violations of contracts between unions and employers has been sustained in a long line of cases (*Bakery & Confectionery W. I. U.* v. *National Biscuit Co.*, 177 F. (2d) 684; *American Federation of Labor* v. *Western Union Tel. Co.*, 179 F. (2d) 535; *Textile Workers Union of America* v. *Arista Mills Co.*, 193 F. (2d) 529; *United Protective Workers of America* v. *Ford Motor Co.*, 194 F. (2d) 997; *Schatte* v. *International Alliance, etc.*, 84 F. Supp. 669, aff'd 182 F. (2d) 158, cert. den. 340 U. S. 827, reh. den. 340 U. S. 885; *Reed* v. *Fawick Airflex Co.*, 86 F. Supp. 822; *Local 937, etc.* v. *Royal Typewriter Co.*, 88 F. Supp. 669; *Zaleski* v. *Local 401, etc.*, 91 F. Supp. 552).

Although the Court's jurisdiction over the subject matter of the cases above cited was founded on Section 301(a) of the Taft-Hartley Law,[7] the right of the unions to prosecute the claims of the individual employees in those cases was plainly based upon the language of Section 301(b) authorizing a union to sue "in behalf of the employees whom it represents".

There is neither logic nor good sense in attempting to limit the provision of Section 301(b) authorizing a union

[7] See *Wilson & Co., Inc.* v. *United Packing House Workers*, 83 F. Supp. 162; *Colonial Hardwood Flooring Co., Inc.* v. *International Furniture Workers*, 76 F. Supp. 493, aff'd 168 F. 2d 33.

to sue "in behalf of the employees whom it represents" to actions for violations of contracts between unions and employers brought under Section 301(a). If Congress had intended such a limitation, it would have placed the language "in behalf of the employees whom it represents" in Section 301(a), which deals exclusively with contract actions, rather than in 301(b), which applies generally to all actions over which the federal courts have jurisdiction, tort as well as contract.[7a] And the policy considerations favoring such representation are just as applicable to tort claims arising out of the area of labor relations as to claims for violation of collective bargaining agreements.

It is plain from the foregoing that Section 301(b) of the Taft-Hartley Law empowers the petitioner to maintain these actions. This conclusion is inescapable not only from the plain language of the section itself but also, and more particularly, when that language is construed in the context of the framework of the law and its overall purposes and in the light of its historical background.

2. *The objections to petitioner's position are without merit.*

The difficulties and problems which the courts below feared would arise from the construction urged by petitioner are illusory.

(1) There is no substance to the fear expressed by the courts below that petitioner's construction of Section 301(b)

[7a] The broad scope of Section 301(b)—the fact that it is applicable to tort as well as contract actions—is plainly shown by its legislative history. Thus, the Conference Report on the Taft-Hartley Law (H. Rept. No. 510, 80th Cong., 1st Sess.) specifically declares (at p. 66) with respect to the types of suits authorized by Section 301(b):

> "This subsection and the succeeding subsections of Section 301 of the conference agreement (as was the case in the House Bill and also in the Senate Amendment) *are general in their application, as distinguished from subsection (a).*" (Italics supplied.)

would open the door to actions by unions on *all* claims of individual employees, without any limitation as to the character of the claims. Despite its broad language, Section 301(b) is part of an act dealing with union representation of employees *in labor relations;* and it is neither the creation of an artificial distinction nor a confession of weakness to recognize that Section 301(b) must be limited to claims arising out of the collective bargaining relationship.

(2) Nor does the construction for which we contend raise any serious problems of *res adjudicata* or of the simultaneous maintenance by a union and by employees of suits on the same claim. In the first place, it should be observed that these questions are just as much involved in suits by unions on behalf of employees for violation of contract under Section 301(a) as in tort actions by unions on behalf of employees under 301(b); and yet it is well settled that unions may prosecute the contract claims of employees whom they represent (see cases cited *supra* at p. 14).

Secondly, the fact that the union is permitted to sue cannot bar an employee from asserting his claim individually until the claim asserted on his behalf by the union is reduced to judgment. By the same token, the fact that the employee may sue does not bar the union from suing on his behalf until the employee's individual claim is reduced to judgment. Only when the claim asserted either by the individual employee or by the union on his behalf is reduced to judgment is the maintenance of an action by the other barred.

There is nothing strange or novel in the notion that two actions upon the same claim can be maintained simultaneously, and that the action which is first reduced to judgment bars the second. It is well settled that a single plaintiff can maintain actions in two jurisdictions against the same defendant upon the same cause of action, and that in that case the action first reduced to judgment bars the mainte-

nance of the other (*Stanton* v. *Embry*, 93 U. S. 548; *Oneida County Bank* v. *Bonney*, 101 N. Y. 173; *Douglass* v. *The Phenix Insurance Company*, 138 N. Y. 209; *Carlette* v. *Olds*, 110 App. Div. 596). Nor does the pendency of a representative action bar the simultaneous maintenance of a similar suit by one of the individuals in whose behalf the representative action is brought; although, of course, recovery of a judgment in the representative action inuring to the benefit of the individual bars further prosecution of his separate suit (Restatement of Judgments, § 85(1); *Brinckerhoff* v. *Bostwick*, 99 N. Y. 185, 194; *Dresdner* v. *Goldman Sachs Trading Corp.*, 240 App. Div. 242, 245).

In accordance with these principles, it is well settled that a judgment binding upon a trustee is equally binding upon the beneficiary of the trust (*Richter* v. *Jerome*, 123 U. S. 233; *Kersh Lake Drainage District* v. *Johnson*, 309 U. S. 485). And, similarly, where a union as party to a collective bargaining contract prosecutes claims inuring to the benefit of employees whom it represents, a judgment in the action brought by the union is a bar to a subsequent action by individual employees; and the employer is fully protected in paying the judgment secured by the union (*Livingston* v. *Todd Shipyards Corp.*, New York Law Journal, July 30, 1947, p. 174, col. 2, Hecht, J., aff'd 274 App. Div. 768; *Kaufman* v. *Leather Workers* (N. Y. S. Ct.), 21 L. R. R. M. 2357; see also, *Cavanagh* v. *Hutcheson*, 140 Misc. 178, aff'd 236 App. Div. 794).

It is plain from the foregoing that the problems and difficulties that the courts below feared would result from the petitioner's construction of Section 301(b) are illusory and without substance. It is equally plain from the language of Section 301(b), from the general structure and overall purposes of the Taft-Hartley Law, from the accepted right of a union to act as the representative of employees, and from the adjudicated cases that Section 301(b) empowers petitioner to maintain these actions "in behalf of the employees whom it represents".

B

Rule 17(a) of the Federal Rules of Civil Procedure empowers petitioner to maintain these actions as party to the collective bargaining agreements with respondents, which were contracts for the benefit of respondents' employees represented by petitioner.

Rule 17(a) provides:

> "Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, *a party with whom or in whose name a contract has been made for the benefit of another,* or a party authorized by statute *may sue in his own name without joining with him the party for whose benefit the action is brought* * * *." (Italics supplied.)

We submit that the petitioner has standing to sue for the reason that it is explicitly authorized by Rule 17(a) to do so. Each of the collective bargaining agreements here involved was negotiated with the respective respondents by the International Union which was acting for petitioner, and which then assigned each contract to petitioner (R. 18, 56, 85-86, 118). Each contract was for the benefit of petitioner's members employed by the respondent with which the contract was made, and these beneficiaries have been collectively injured by each respondent's fraud in the making of the contract to which it was a party. Clearly, petitioner's suits to recover damages for the respondents' wrongdoing are within the express language of Rule 17(a).

The law is clear that the promisee of a contract made for the benefit of a third person may always sue on behalf of such beneficiary to enforce the contract or to recover damages for its breach. Such is the law in the federal courts under Rule 17(a) (*American Federation of Labor* v. *Western Union Telegraph Co.*, 179 F. (2d) 535 (C. A. 6th, 1950); *Local 793, UAW-CIO* v. *Auto Specialties Co.*, 27 L. R. R. M. 2368 (U. S. D. C., W. D. Mich., Feb. 5, 1951); *Shilling* v.

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Fuchs, 12 F. R. S. 256; *Coxhead* v. *Winsted Hardware Mfg. Co.*, 4 F. R. D. 448; *Farmers Underwriters Assn.* v. *Wanner*, 30 F. Supp. 358). Such is also the law under state statutes substantially identical with Rule 17(a) (*Considerant* v. *Brisbane*, 22 N. Y. 389; *Seymour* v. *Smith*, 114 N. Y. 481; *Hunt* v. *Provident Savings Life Assurance Soc.*, 77 App. Div. 338).

In accordance with the foregoing authorities, a number of cases have held that the promisee of a contract for the benefit of a third party may maintain an action upon a claim inuring to the benefit of the third party and arising out of a tort relating to the making or performance of the contract (*Constanzo Coal Mining Co.* v. *Weirton Steel Co.*, 150 F. 2d 929 (C. A. 4th); *Hale* v. *McDermott*, 78 Misc. 52 (App. T.); *Hewitt* v. *New York, New Haven & Hartford R.R. Co.*, 166 Misc. 186; *Sioux City* v. *Western Asphalt Par. Co.*, 223 Iowa 279).

The cases above cited plainly establish that petitioner is entitled to maintain these actions, pursuant to Rule 17(a) of the Federal Rules of Civil Procedure, as party to the collective bargaining agreements with respondents, to enforce the claims of the employees represented by it who were the beneficiaries of those collective bargaining agreements.

C

The amount in controversy in each action here involved is the total amount for which petitioner is suing.

1. *By virtue of petitioner's status as a statutory trustee under Section 301(b) of the Taft-Hartley Law.*

If petitioner is correct in its contention that Section 301(b) of the Taft-Hartley Law empowers it to maintain these actions as a statutory trustee, it is plain that the amount in controversy in each action is the total recovery sought.

The law is clear that where one sues as a "party authorized by statute" the amount in controversy is the total recovery sought. For example, in *Local Union No. 497, etc.* v. *Joplin & P. Ry. Co.*, 287 Fed. 473 (C. A. 8th), plaintiff union sued to recover in favor of its members, employees of defendant company, for the difference between the actual wages paid those employees and the minimum rates required by the Kansas Court of Industrial Relations. The union brought suit in a State court pursuant to a State statute analogous to Section 301(b) of the Taft-Hartley Law and the defendant removed the case to the Federal court. On plaintiff's motion to remand, on the ground that the jurisdictional amount was not met since none of the separate claims of the individual employees exceeded $100, the Court rejected the contention and denied the motion. The Court expressly held that the amount in controversy for purposes of Federal jurisdiction was measured by the total amount sued for because the Kansas statute specifically authorized the union to sue on behalf of its members as a group (see 287 Fed. at p. 474). The Court declared (at pp. 475-476):

> "This action is brought by or upon behalf of the employees, members of the union, collectively, to recover the amount alleged to have been in effect adjudged to be due to them by the finding and order of the industrial court of April 23, 1920. This action was and is founded on that finding and order. The plaintiffs alleged in their complaint, and the defendant denied in its answer, and still denies, that that finding and order in effect adjudged that the defendant owed and should pay to the employees, the members of the union, collectively, $7,271.47 *and this was and is the sole matter in controversy between them in this action.*" (Italics supplied.)

In consonance with the foregoing principle is the rule that where suit is brought by a trustee—and, as indicated above, the status of petitioner under Section 301(b) is in effect that of a trustee—the amount in controversy is the aggre-

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gate sum sought to be recovered rather than the separate individual claims of the various beneficiaries (*Bullard* v. *City of Cisco*, 290 U. S. 179; *Royal Oak Drain Dist.* v. *Keefe*, 87 F. (2d) 786; *Hann* v. *City of Clinton*, 131 F. (2d) 978).

2. *By virtue of petitioner's status as "a party with whom * * * a contract has been made for the benefit of another" under Rule 17(a) of the Federal Rules of Civil Procedure.*

If petitioner is correct in its contention that Rule 17(a) of the Federal Rules of Civil Procedure empowers it to maintain these actions as "a party with whom * * * a contract has been made for the benefit of another" it is plain that the amount in controversy in each action is the total recovery sought.

It should be observed that Rule 17(a) treats "a party with whom or in whose name a contract has been made for the benefit of another" in exactly the same manner as it treats a "trustee" and "a party authorized by statute." Each is empowered by the Rule to "sue in his own name without joining with him the party for whose benefit the action is brought." Accordingly, the decisions holding that the amount in controversy in suits by trustees and parties authorized by statute is the total sum sued for are equally applicable to suits by parties to contracts for the benefit of others.

Indeed, a contrary conclusion would import strange anomalies into the application of the Rule. The cited cases recognize that it would be absurd to hold that a trustee can protect the trust estate from damage in the sum of $3,000 if there is only one beneficiary, but not if there are more than one. They also recognize that it would be unjust to permit a party authorized by statute to represent only those persons whose individual interests exceed $3,000. We submit that it would be equally inequitable to hold that a party to a contract for the benefit of others can

bring suit only on behalf of those beneficiaries of the contract whose interests exceed $3,000. Such a rule would be contrary to logic and justice and the plain meaning of Rule 17(a). The cases cited above plainly establish the contrary and show that in a suit by a person authorized to maintain an action under Rule 17(a), the amount in controversy is the total sum sought to be recovered.

3. *By virtue of the fact that petitioner is suing in each action to recover a fund in which the employees of the respective respondents have a common and undivided interest.*

Under New York law, the damages sustained by the employees of each respondent represented by petitioner are conclusively presumed to be at least the amount of the bribe paid by such respondent to Bove. This is so because of the well settled rule that where one of two parties to a contract of purchase and sale bribes the agent of the other, the party whose agent has been bribed is *conclusively presumed as a matter of law* to have been damaged in at least the amount of the bribe (*Donemar, Inc.* v. *Molloy*, 252 N. Y. 360; see also, *Rush* v. *Curtiss-Wright Export Corp.*, 263 App. Div. 69, 71; *Matter of Browning*, 176 Misc. 308; *Matter of Browning*, 177 Misc. 328, aff'd 262 App. Div. 489).

The rule of the *Donemar* case, of course protects both vendor and vendee. Not only is a purchaser entitled to recover a bribe paid to his agent by a vendor on the theory that it is conclusively presumed, under such circumstances, that the purchaser has *overpaid* for the goods bought by at least the amount of the bribe, but, in a situation where a seller's agent has ben bribed by a purchaser, it is conclusively presumed as a matter of law that the seller has been *underpaid* by at least the amount of the bribe.[8]

[8] It should be noted that Penal Law, Section 380, specifically makes it a misdemeanor to bribe a representative of a labor organization.

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In each of the cases at bar, the employees of each respondent represented by petitioner rendered services to the respondent. The price for which they did so was fixed in the contract negotiated on their behalf by Bove. It is therefore conclusively presumed as a matter of law that they were underpaid as a group in at least the amount of the bribe paid by each respondent to Bove.

It follows that the amount of the bribe paid by each respondent is a fund in which the employees of each respondent represented by petitioner have a common and undivided interest and which they are jointly entitled to recover. These actions are for the purpose of recovering each such fund as a whole. All that must be proved in each action is that Bove was bribed by the respondent under the circumstances set forth in the amended complaint and in the amount alleged; it is entirely unnecessary to prove the separate damage sustained by each individual employee. Distribution of each fund to the employees of each respondent represented by petitioner, as the interests of these employees in the fund may respectively appear, is separate from and ancillary to the object of this action.

It is well settled that in actions such as those here involved for the recovery of funds in which the interested parties have a common and undivided right, the amount in controversy is the entire fund rather than the separate shares therein of the interested parties (*Miller* v. *National City Bank of New York*, 147 F. 2d 798; *Eresch* v. *Braecklein*, 133 F. 2d 12; *Alliance Ins. Co.* v. *Jamerson*, 12 F. Supp. 957, aff'd *sub. nom. Jamerson* v. *Alliance Ins. Co.*, 87 F. 2d 253; *Fireman's Fund Ins. Co.* v. *Crandall Hose Co.*, 47 F. Supp. 78; *Pacific Fire Ins. Co.* v. *C. C. Anderson Co.*, 42 F. Supp. 917).

The issue in each of the cases here involved is not concerned with the individual damage suffered by each employee represented by petitioner, but whether the employees of each respondent involved are entitled as a group to re-

cover anything at all. For either the employees of each respondent represented by petitioner are entitled to recover the full amount of the bribe paid by that respondent, admittedly in excess of $3,000, or they are entitled to nothing at all. Accordingly, the determination of the *pro rata* share of each employee in such fund is subsidiary to the basic issue raised by the amended complaints, namely, whether the employees are entitled to recover at all. That issue can be determined entirely without reference to the separate damage suffered by each employee. The amount which each employee may eventually be entitled to is entirely dependent upon the determination in the first instance, of the aggregate amount of the fund recovered for the common benefit of all, in which each will be entitled to a *pro rata* share; and the recovery of such aggregate amount is the sole purpose of these suits.

Aside from the foregoing considerations, the amount in controversy in each action is the aggregate amount of the recovery sought for the further and separate reason that the right of the employees of each respondent represented by petitioner flows from such respondent's fraud in the making of a single agreement—the collective bargaining agreement between the petitioner and such respondent as contracting parties, and with such employees as third-party beneficiaries.

It has long been settled that where several plaintiffs sue to enforce claims which arise from a common title, the amount in controversy is not the individual claim of each plaintiff, but the aggregate amount of their claims asserted (*Shields* v. *Thomas*, 17 How. 3). And it is equally well settled that where several persons sue to enforce rights which are derived from the same contract the amount in controversy is the aggregate recovery sought rather than the individual right of each separate plaintiff (*Phillips Petroleum Co.* v. *Taylor*, 115 F. (2d) 726; *Division 525, Order of Ry. Conductors of America* v. *Gorman*, 133 F. (2d) 273).

The fact that the cases at bar are for fraud in the making of the contract, rather than to enforce the contract or for its breach, does not alter the situation. For it is plain that, where a number of persons seek to recover damages for fraud in the making of a single agreement, the rights and interests of all such persons are common and undivided and may be aggregated to achieve the requisite jurisdictional amount (*General Finance Corporation* v. *Keystone Credit Corp.*, 50 F. (2d) 872).

D.

The maintenance by petitioner of the within actions pursuant to Section 301 (b) of the Taft-Hartley Law does not involve the retroactive application of a new substantive right.

It is true, as the Court of Appeals pointed out (Appendix I, *infra* at p. 40) that the right of each of the employees represented by petitioner came into existence prior to the enactment of the Taft-Hartley Law. It does not follow from this, however, that to construe Section 301(b) as empowering petitioner to maintain these actions in behalf of such employees would result in the retroactive application of a new substantive right.

The *substantive* right here involved is not a right which was created by the Taft-Hartley Law. It is the right of the employees represented by petitioner to recover from respondents on account of respondents' fraud. *That substantive right existed under New York Law long prior to the enactment of the Taft-Hartley Law; and it is that substantive right and none other that petitioner is seeking to enforce in these actions.*

No substantive right created by the Taft-Hartley Law is sought to be enforced here. Section 301(b) of the Taft-Hartley Law is relied on only for the purpose of establishing petitioner's standing as a procedural matter to maintain the actions. It is relied on only insofar as it empowers

petitioner to bring suit "in behalf of the employees whom it represents." Plainly, the provision of Section 301(b) in question does not impair vested rights or create any substantive rights whatever. The authority of one person to maintain an action on behalf of another is, at most, a procedural device relating to the remedy. And our law is well settled that a remedy speaks as of the time when it is sought to employ it for the enforcement of a right. In other words, if a liability came into being at the time when the operative events occurred, any remedy in existence at a later time, when enforcement of the liability is sought, may be utilized (*Matter of Berkovitz* v. *Arbib & Houlberg*, 230 N. Y. 261; *Pacific Indemnity Co.* v. *Insurance Co.*, 25 F. 2d 930 (C. A. 9th); *Federal Reserve Bank* v. *Kalin*, 77 F. 2d 50 (C. A. 4th)).

To be sure, Section 301(a) of the Taft-Hartley Law, which provides that suits for violation of collective bargaining agreements may be brought in the District Courts of the United States without respect to the amount in controversy or without regard to the citizenship of the parties, cannot be applied retroactively. Section 301(a), however, as distinguished from Section 301(b), has been held to create a *new Federal substantive right*. For in the absence of a Federal substantive right, jurisdiction could not constitutionally be vested in the District Courts without diversity of citizenship (*Schatte* v. *International Alliance*, 182 F. 2nd 158 (C. A. 9th, 1950)). Since Section 301(b), on the other hand, does not create any new substantive right, but merely furnishes a new procedural device for the enforcement of substantive rights already existing under state law, that section must be construed as remedial provisions are normally construed, namely, to apply to every action brought after the enactment of the section, whether or not the cause of action arose prior to its enactment.

CONCLUSION

The decisions of the courts below, both as to the power of petitioner to maintain the within actions and as to the amount in controversy in each of those actions, run counter to the clearly defined policy of the Federal Government in labor relations. That policy, particularly as it is embodied in the Taft-Hartley Law, is to provide for effective representation of employees by labor unions in all matters and controversies relating to and arising out of the collective bargaining relationship.

The principles underlying that policy have been well established for many years and are now universally recognized and accepted. Unions have a direct and vital interest in the enforcement of all claims arising out of the collective bargaining relationship, even though the actual money recovery will inure to the individual employees. If the employment rights of one employee can be evaded with impunity, the rights of all other employees represented by the union are jeopardized and the union, which under the Taft-Hartley Law is the exclusive representative of all the employees, has a vital interest in preventing this. Particularly is this true where, as in the cases here involved, the illegal acts committed by the employer were directed against the union and the employees as a whole. Furthermore, because of the weakness of individual employees and their ever present fear of reprisals from employers, effective enforcement of individual rights, particularly under the circumstances involved in the instant cases, cannot be relied upon to come from the separate action of individual employees. Effective enforcement can come only through the union as their representative.

The decisions of the courts below, if permitted to stand, will render such effective enforcement of the rights of employees impossible in suits in the Federal Courts. By adopting a narrow construction of Section 301(b) of the

Taft-Hartley Law and Rule 17(a) of the Federal Rules
Civil Procedure, and by establishing a highly technical
artificial standard for the determination of the amount
controversy in actions brought by unions in the Fede
Courts to enforce the rights of employees whom they r
resent, the decisions of the courts below have enuncia
rules which completely frustrate the laws and policies
the United States favoring the protection in the Fede
Courts of the rights of employees arising out of the col
tive bargaining relationship. Accordingly, the grant
of a writ of certiorari by this Court is essential in or
to protect and vindicate the broad public interests wh
are directly and adversely affected by the decisions bel

Dated: New York, March 3, 1955.

Respectfully submitted,

HYMAN N. GLICKSTEIN,
Attorney for Petitio

FRANCIS MARTOCCI,
CHARLES DE LA VERGNE,
DANIEL W. MEYER,
of Counsel.

APPENDIX I

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

Nos. 16, 17, 18, 19—October Term 1954

Argued November 5, 1954 Decided December 6, 1954

Docket Nos. 23066, 23065, 23067, 23068

ROCK DRILLING, BLASTING, ROADS, SEWERS, VIADUCTS, BRIDGES, FOUNDATIONS, EXCAVATIONS AND CONCRETE WORK ON ALL CONSTRUCTION, HOD CARRIERS', BUILDING AND COMMON LABORERS' LOCAL UNION NO. 17, Petitioner,

against

MASON & HANGER COMPANY, INC., Respondent.

ROCK DRILLING, BLASTING, ROADS, SEWERS, VIADUCTS, BRIDGES, FOUNDATIONS, EXCAVATIONS AND CONCRETE WORK ON ALL CONSTRUCTION, HOD CARRIERS', BUILDING AND COMMON LABORERS' LOCAL UNION NO. 17, Petitioner,

against

WALSH CONSTRUCTION COMPANY, INC., Respondent.

ROCK DRILLING, BLASTING, ROADS, SEWERS, VIADUCTS, BRIDGES, FOUNDATIONS, EXCAVATIONS AND CONCRETE WORK ON ALL CONSTRUCTION, HOD CARRIERS', BUILDING AND COMMON LABORERS' LOCAL UNION NO. 17, Petitioner,

against

B. PERINI & SONS, INC., Respondent.

ROCK DRILLING, BLASTING, ROADS, SEWERS, VIADUCTS, BRIDGES, FOUNDATIONS, EXCAVATIONS AND CONCRETE WORK ON ALL CONSTRUCTION, HOD CARRIERS', BUILDING AND COMMON LABORERS' LOCAL UNION NO. 17, Petitioner,

against

GEORGE M. BREWSTER & SON, INC., Respondent.

Before CHASE, MEDINA and HINCKS, *Circuit Judges.*

Appeals from orders of the United States District Court for the Southern District of New York dismissing the complaint (Judge Rifkind) and the amended complaint (Judge Samuel H. Kaufman) for lack of jurisdiction and for failure to state a claim on which relief could be granted. Opinion of Judge Rifkind below (90 F. Supp. 539). Affirmed for lack of jurisdiction.

Boudin, Cohn & Glickstein, Francis Martocci and Charles De La Vergne (Hyman N. Glickstein and Daniel W. Meyer of counsel) for plaintiff-appellant.

Nevius, Brett & Kellogg for defendant-appellee Mason & Hanger Company, Inc., and Willkie, Owen, Farr, Gallagher & Walton for defendants-appellees Walsh Construction Company, Inc., and B. Perini & Sons, Inc. (Franklin Nevius, Mark F. Hughes, James E. Carroll and F. Davis Gardner of counsel).

William H. Wurts for defendant-appellee George M. Brewster & Son, Inc.

MEDINA, Circuit Judge—These are four companion actions in tort by a labor union to recover damages alleged to have been sustained severally by some hundreds of employees of each defendant by reason of diminution of wages and lack of proper working conditions, said to have been caused by the operation of a conspiracy between one James Bove and each of defendants pursuant to which certain bribes were paid by each defendant to Bove. References herein are to the record in the action against Mason & Hanger Company, Inc., as the opinion below was published under the title of that action.

The original complaints were dismissed by Judge Rifkind for lack of jurisdiction of subject matter and for failure to state a claim upon which relief could be granted. Amended complaints were dismissed by Judge Samuel H. Kaufman, who found that, "notwithstanding some changes in verbiage and some additions," the amended complaints suffered from the same infirmities as were apparent upon the face of the others. These appeals bring up for our consideration the sufficiency of both the original and the amended complaints.

The original complaint asserted jurisdiction "by virtue of the provisions of section 301 * of the Labor Management

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* SUITS BY AND AGAINST LABOR ORGANIZATIONS.

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Relations Act of 1947" (the Taft-Hartley Act) and 28 U. S. C. A., section 1332, alleging diversity of citizenship (plaintiff and all its members being citizens of New York and defendant a West Virginia corporation), together with the usual conclusory statement that "the amount in controversy herein, exclusive of interest and costs, exceeds the sum or value of $3,000."

The charge was that Bove was vice-president of International Hod Carriers', Building and Common Laborers' Union of America, the parent international of the plaintiff local union; that Bove dominated and controlled the plaintiff and represented plaintiff and its members in collective bargaining with employers. It is alleged that between August 28, 1939, and August 22, 1944, upwards of 400 workmen, members of the plaintiff, worked for defendant in the performance of a contract between defendant and the Board of Water Supply of the City of New York for the construction of part of the Delaware Aqueduct Project, which provided for lower rates of pay and more dangerous and deleterious working conditions than would have been the case but for "a fraudulent, wrongful and illegal conspiracy," formed in July, 1939, between Bove and defendant, in the operation and pursuant to the terms of which defendant paid Bove a bribe of $36,000 and Bove caused the workmen to agree and they "agreed to and did, during the aforesaid period of time, render labor and services for the defendant at the aforesaid lower rate of wages and more dangerous and deleterious working conditions," and sustained other loss, "all to the damage of the plaintiff as the representative of its said members" in the sum of $600,000, the conspiracy not having been discovered until March 8, 1945. The parties stipulated that the "plaintiff has brought this action in a representative capacity on behalf of its members who were employed by defendant," and that "the damages sought * * * are and are limited to the damages sustained by those members of the plaintiff who were employed by the defendant as aforesaid."

Thus, on the face of the original complaint it is clear beyond cavil that the action sounded in tort and that plaintiff had aggregated some 400 separate individual claims for damages amounting in all to $600,000, but considerably less than $3,000 apiece.

The amended complaint asserts jurisdiction on the same basis as before, realleges the making of the contract with the board of water supply, the conspiracy with and the payment of the $36,000 bribe to Bove, and the rendition of services by the workers for lower rates of pay and under more dangerous and deleterious working conditions, with a slightly different choice of words here and there. What is claimed to be significantly new is (1) the inclusion of allegations that the International, through Bove, negotiated with defendant and executed a collective bargaining agreement fixing rates of pay and working conditions said to be lower and more dangerous and deleterious than would have been the case but for the conspiracy and the payment of the bribe, and that the collective bargaining agreement was executed "on behalf of the plaintiff and its members" and "the same was assigned by the International to the plaintiff"; (2) the inclusion of an allegation that defendant was "unjustly enriched" in the amount of the bribe of $36,000, and "the members of the plaintiff employed by the defendant as aforesaid were damaged at least in the said amount"; and (3) a prayer for relief "declaring and adjudging" that the collective bargaining agreement was made pursuant to the conspiracy and in consideration of the bribe; that "the members of the plaintiff" were damaged at least in the amount of $36,000, and "diecting" that $36,000 be paid to plaintiff, and that plaintiff hold the same "as trustee for its said members for distribution among them as their respective interests may ultimately appear." The parties again stipulated that the damages sought were limited to those sustained by the members of plaintiff who were employed by defendant in the performance of the contract with the board of water supply.

Every event upon which plaintiff rests its claim for relief occurred prior to the passage of the Taft-Hartley Act in 1947.

Reversing the normal order, and doing so solely for the sake of clarity and to avoid repetition, we shall discuss last the question of jurisdiction over the subject matter of the action.

At the outset it is clear that at common law no cause of action whatever would have been vested in plaintiff as a matter of substantive law (see 3 Moore's Federal Practice, 2d ed., pp. 1331-2). Nor did an unincorporated association such as plaintiff have any capacity to sue or be sued (Moffat Tunnel League v. United States, 289 U. S., 113, 118, 1933). There was no such separate entity known to common law procedure, and each and every member of the association was required to join or be joined as in the case of partners. Such is still the law in many state jurisdictions today, although it is quite common, as in New York, to find code or other statutory provisions permitting actions to be maintained by or against the president or treasurer or other officers of an unincorporated association.

In addition to the limited general terms of Rule 17(b) of the Federal Rules of Civil Procedure, on "Capacity to Sue and Be Sued," specific provisions are contained in Title III of the Taft-Hartley Act relative to "Suits by and against Labor Organizations." Section 301(a) serves the dual purpose of giving the United States District Courts jurisdiction to entertain and decide suits by labor unions "for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce, * * * without respect to the amount in controversy or without regard to the citizenship of the parties," and also, by necessary implication, constituted such labor unions the trustees of recoveries in such actions for the benefit of such of the employees as might be entitled to the proceeds thereof. This section 301(a) has been

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held to have created "a new substantive liability," and not applicable to breaches of contract which antedated June 23, 1947, when the Taft-Hartley Act was enacted (Schatte v. International Alliance, &c., 182 F. 2d, 158, 9th Cir., 1950, certiorari denied 340 U. S., 827, 1950, rehearing denied 340 U. S., 885, 1950; Studio Carpenters Local Union v. Loew's, Inc., 182 F., 2d, 168, 9th Cir., 1950, certiorari denied 340 U. S., 828, 1950, rehearing denied 340 U. S., 885, 1950).

The capacity provision, applicable generally to all suits by or against labor unions, is contained in section 301(b), as follows: "Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States." This is followed, in the same and subsequent subdivisions of section 301, by certain limitations concerning the enforcibility of the judgment, venue, service of process and allied procedural matters, all of which together comprise a harmonious and consistent pattern, when section 301 is considered as a whole.

The expansion of jurisdiction and the creation of the substantive right to maintain particular suits, which we find in section 301(a), are strictly limited to those for violation of contracts, such, for example, as the collective bargaining contract negotiated here between the International and the defendant. We need not pause to consider whether a local union, as assignee, is intended to be included.

Nor is there anything ambiguous about the expression "as an entity and in behalf of the employees." These words merely round out and clarify the meaning of the sentence as a capacity statute and nothing more. No substantive rights whatever are affected thereby. The unincorporated association is recognized as "an entity," despite the fact that it acts and will sue or be sued only "in behalf of the employees whom it represents."

Plaintiff would have us construe these words as a blanket and retroactive grant of authority to unions to maintain

in behalf of their members suits of any character, whether of tort or contract, and irrespective of the nature of the rights, obligations or duties involved, provided only that the litigation arises in some vague way "out of the employment relationship." This would indeed open a Pandora's box, and the resulting evils and inconveniences would perhaps lead to unsatisfactory conditions reminiscent of those existing prior to the passage of the Portal-to-Portal Act of 1947 (61 Stat., 84, 29 U. S. C. A., secs. 251 et seq.). Nothing short of a clear and positive mandate by the Congress could suffice to work such a revolutionary change (cf. Elgin, J. & E. R. Co. v. Burley, 325 U. S., 711, 733-4, 1945, on rehearing 327 U. S., 661, 1946).

Moreover, it seems more than passing strange that the Congress should so carefully limit the clause, subdivision (a), to suits for violation of a particular type of contracts, and then, in subdivision (b), throw the door wide open to the maintenance by unions "in the courts of the United States" of actions to recover damages for private torts committed by the employer against individual employees, in the course of the "employment relationship," provided there were the requisite diversity of citizenship and the necessary amount in controversy. This flies in the face of common sense.

A careful appraisal of the natural and inevitable consequences of the adoption of plaintiff's interpretation of section 301 makes it apparent that this view of its meaning is designed not as a reasonable construction of the statute, but is merely a distortion of its meaning to make it fit this case.

If a labor union is thus authorized to sue to recover damages recoverable by individual workers for separate torts, what is to become of the phrase "may sue or be sued"? If in the course of the "employment relationship" an employee does some private sabotage or assaults the manager, or otherwise does damage to person or property, can it be

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intended that the union may be held liable? Plaintiff answers no. But the phrase is "sue or be sued"; a construction which in a given category of cases favors maintenance of the suit must likewise be applicable when the shoe is on the other foot.

Furthermore, the adoption of the interpretation of section 301(b) which plaintiff presses upon us would raise a multiplicity of other questions the answers to which are not to be found either in the crucial sentence relied on or anywhere else in the statute. It is not disputed that each of the individual workers who suffered loss through the operation of the alleged conspiracy could sue alone to recover his damages. Must such a suit be commenced before action is taken by the union? The claims of each of the 400 employees would seem to involve questions of law or fact common to his own claim and that of the others. Assuming that he could comply with the conditions prescribed in Rule 23(a) of the Federal Rules of Civil Procedure, and that, with diversity as here, the claim of each was in excess of $3,000, exclusive of interest and costs, one worker might choose to sue as a member of the class, for his own benefit and for the benefit of some or all of the others. Are all to be subordinated to the control of the union, and thus compelled to leave the management of the litigation of their personal rights to the judgment of the attorney for the union? Suppose the union desired to press the claims of some but less than all the workers? Nothing in the views submitted for our consideration would seem to prevent the union from doing so. Nor is the operation of the doctrine of res judicata to the various phases of this problem free from serious doubt. Counsel tell us that the Congress intended that the right to sue be limited to the enforcement of obligations arising "out of the employment relationship." But this is pure assertion. No such words of limitation are to be found in section 301(b). If section 301(b) is to be construed as anything more than a simple capacity statute, we can find no basis for construing it in

such fashion as to justify this particular suit, but to go no further. If the Congress intended the unions to be general litigating agencies for the workers, why not go the whole hog? These doubts and perplexities merely serve to emphasize the fact that the entire subject was one which the Congress chose to leave alone, except in the case of suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce, as provided in section 301(a), and giving to such organizations generally the capacity to sue or be sued in the federal courts as provided in section 301(b).

The portion of section 301(b) relied upon by plaintiff is a capacity statute pure and simple, and goes no further (Amazon Cotton Mill Co. v. Textile Workers Union, 167 F., 2d, 183, 187-8, 4th Cir., 1948). Moreover, nothing in the legislative history of the Taft-Hartley Act has been called to our attention, nor has our own research revealed anything to indicate that the intention of the Congress was otherwise.

Nor need we tarry long over rule 23 of the Federal Rules of Civil Procedure, applicable to class actions and providing: "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right * * * is * * * (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought." As plaintiff is not a member of the class, Rule 23 is not applicable.

So much for procedure, and we turn to the substantive law phase of the case.

The pertinent part of Rule 17 of the Federal Rules of Civil Procedure provides: "Every action shall be prosecuted in the name of the real party in interest; but * * * a party with whom or in whose name a contract has been

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made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought * * *."

It is elementary that the jurisdiction of the federal courts is neither enlarged nor restricted by this rule, and that its purport is to require that the action be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced (3 Moore's Federal Practice, 2d ed., pp. 1305, 1311).

Plaintiff claims that it has a right to sue, because it is both "a party with whom or in whose name a contract has been made for the benefit of another" and "a party authorized by statute." But we have already seen that the only statute claimed to have any relevancy to the case, section 301(b) of the Taft-Hartley Act, is a mere regulation of procedure, conferring no substantive rights whatever upon the union. And a consideration of the very considerable number of cases construing Rule 17 and its counterpart in various state codes discloses nothing to support plaintiff's contention that the contract clause is applicable to actions to recover for torts if the suit "relates to the making of the contract or its performance." Here the claim sought to be enforced "relates" to the collective bargaining contract only in an incidental way. The gist of the action is the wrongful conduct of defendant in conspiring with Bove and bribing him, as alleged. This is neither a suit to enforce the contract nor to recover for a breach thereof.

The elaborate argument concerning suits by the promisee of a third-party beneficiary contract expends itself without affecting the matter in hand. Where an employer enters into a collective bargaining agreement with a union, followed by individual wage contracts with the employees, and then fails to pay the wages agreed upon, or otherwise commits a breach of the agreement, it may well be that the collective bargaining agreement becomes part of the terms of employment, and that either the union or the employee

may sue in the federal courts—the union pursuant to the provisions of section 301(a), irrespective of diversity or amount, and the employee only upon a showing of diversity and an amount in controversy over $3,000, exclusive of interest and costs (United Protective Workers of America v. Ford Motor Co., 194 F. 2d, 997, 7th Cir., 1952). Even this phase of the general problem is not free from doubt, where the union sues in the federal courts, despite the fact that section 301(a) of the Taft-Hartley Act contains "a grant of federal-question jurisdiction and thus creates a federal, substantive right" (see Association of Westinghouse v. Westinghouse El. Corp'n, 210 F., 2d, 623, 3d Cir., 1954, certiorari granted 347 U. S., 1010, 1954). But we are not concerned here with deciding who may sue for breach of the agreement alleged to have been wrongfully and conspiratorially negotiated by Bove, but rather with the substantive law question: In whom is vested the right to recover damages for the torts alleged to have been committed by defendant in breach of its duty to its several employees to refrain from wrongfully injuring them?

We conclude that there is nothing in Rule 17 to support plaintiff's substantive right to sue for the recovery of the damages sustained severally by the 400 employees.

Moreover, we must not forget that the rights of each of the employees whom plaintiff claims to represent came into existence long prior to the Taft-Hartley Act. A statute conferring no more than capacity to sue or be sued is remedial, and may be given immediate effect; but plaintiff has not afforded us with any enlightenment on the subject of how the substantive law could be changed retroactively so as to vest in the union the rights claimed for it without the plainest sort of statutory language requiring retroactive effect (Chew Heong v. United States, 112 U. S., 536, 559, 1884), and, even then, without raising constitutional questions which could not lightly be brushed aside. We have already observed that the courts have refused to give retro-

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active effect to the provisions of section 301(a) (Schatte v. Internat. Alliance; Studio Carpenters Local Union v. Loew's, Inc., supra).

The foregoing discussion of the procedural and substantive aspects of the case has left little to be said on the decisive subject of jurisdiction. As section 301(b) merely gives unincorporated labor organizations a status in the federal courts where commerce is affected, and as section 301(a) confers jurisdiction, irrespective of the amount in controversy and the citizenship of the parties, only of suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce, there is no federal-question jurisdiction here; and plaintiff must fall back on diversity. But plaintiff is again confronted by an insurmountable obstacle. The claims sought to be enforced are several rather than joint, and no single claim amounts to more than a few hundred dollars. May these 400 claims be aggregated to make up the necessary jurisdictional amount in controversy?

The controlling principles have long been settled. Whether the parties be several, or one suing in a representative capacity on behalf of others, the amounts claimed by or on behalf of each of those injured by the wrongful conduct of defendant may be aggregated only where those "having a common undivided interest, unite to enforce a single title or right" (Thomson v. Gaskill, 315 U. S., 442, 1942). And this is the established law even though the several claims are derived from a single instrument or arise as the result of a negligent or wrongful act which results in loss or damage to many persons (Pinel v. Pinel, 240 U. S., 594, 1916; Clark v. Paul Gray, Inc., 306 U. S., 583, 1939).

While plaintiff argues that the theory of the amended complaint, and the additional allegations therein contained, has changed the nature of the rights sought to be asserted in this case so that there is now "a common undivided in-

terest" and "a single title or right," the amended complaint shows clearly on its face that this is not so. By asserting "unjust enrichment" in the amount of the bribe, reducing the ad damnum clause from $600,000 to $36,000, as "at least" the amount of the aggregate damage, and calling this a "fund" to which plaintiff is entitled "as trustee," plaintiff has merely added verbiage. There is no fund. The claim remains one on behalf of 400 separate individuals for the damage suffered by each due to the alleged tortious conduct of defendant in entering into the alleged conspiracy with Bove and paying him the bribe of $36,000.

Nothing to the contrary was held in Local Union No. 497, &c., v. Joplin & P. R'y Co. (287 F., 473, 8th Cir., 1923), where an action authorized by the terms of a Kansas statute was removed to the federal court and it was held that the requisite jurisdictional amount was involved because the statute authorized the maintenance of the suit "collectively" to recover the aggregate difference between the wages actually paid and those "found and determined" by the Kansas Court of Industrial Relations. As stated by Judge Sanborn (p. 476): "The only controversy between the plaintiffs and the defendant is whether or not by reason of the order and finding of the industrial court the defendant was in legal effect adjudged to pay the plaintiffs the $7,271.47 or any of it."

Nor does anything contained in New York Penal Law, section 439, and Donemar, Inc. v. Molloy (252 N. Y., 360, 1930), which seem to have little bearing on the case, alter the fact that the claims of each of the 400 odd employees, whom plaintiff claims to represent, are for the damages individually suffered by each of them by reason of defendant's tortious conduct. Here again, what is plainly a series of separate and distinct claims cannot be transmuted into "a single title or right" by the mere expedient of asking for less damages than each would be entitled to were he to have sued alone and casting the prayer for relief in

the form of a declaratory judgment proceeding affecting the disposition of a so-called "fund".

Accordingly, even if the plaintiff had some right to recover on behalf of each of the 400 odd employees described in the complaints, which we think not to be the case, it would still be plain on the face of the complaints that the District Court was wholly without jurisdiction of the subject matter of the action.

So much of the orders appealed from as dismisses the complaint and the amended complaint for lack of jurisdiction is affirmed.

APPENDIX II

Judgments of Affirmance.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of December one thousand nine hundred and fifty-four.

Present:

HON. HARRIE B. CHASE,
HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
Circuit Judges.

ROCK DRILLING, BLASTING, ROADS, SEWERS, VIADUCTS, BRIDGES, FOUNDATIONS, EXCAVATIONS AND CONCRETE WORK ON ALL CONSTRUCTION, HOD CARRIERS', BUILDING & COMMON LABORERS' LOCAL UNION NO. 17,
Plaintiff-Appellant,

v.

WALSH CONSTRUCTION CO., INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the orders and judgment of said District Court be and they hereby are affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ A. DANIEL FUSARO,
Clerk.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of December one thousand nine hundred and fifty-four.

Present:

HON. HARRIE B. CHASE,
HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
Circuit Judges.

ROCK DRILLING, BLASTING, ROADS, SEWERS, VIADUCTS, BRIDGES, FOUNDATIONS, EXCAVATIONS AND CONCRETE WORK ON ALL CONSTRUCTION, HOD CARRIERS', BUILDING & COMMON LABORERS' LOCAL UNION NO. 17,
Plaintiff-Appellant,

v.

MASON & HANGER CO., INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the orders and judgment of said District Court be and they hereby are affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ A. DANIEL FUSARO,
Clerk.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of December one thousand nine hundred and fifty-four.

Present:

HON. HARRIE B. CHASE,
HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
Circuit Judges.

ROCK DRILLING, BLASTING, ROADS, SEWERS, VIADUCTS, BRIDGES, FOUNDATIONS, EXCAVATIONS AND CONCRETE WORK ON ALL CONSTRUCTION, HOD CARRIERS', BUILDING & COMMON LABORERS' LOCAL UNION NO. 17,
Plaintiff-Appellant,

v.

B. PERINI & SONS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the orders and judgment of said District Court be and they hereby are affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ A. DANIEL FUSARO,
Clerk.

UNITED STATES COURT OF APPEALS

For the Second Circuit.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of December one thousand nine hundred and fifty-four.

Present:

Hon. Harrie B. Chase,
Hon. Harold R. Medina,
Hon. Carroll C. Hincks,
Circuit Judges.

Rock Drilling, Blasting, Roads, Sewers, Viaducts, Bridges, Foundations, Excavations and Concrete Work on All Construction, Hod Carriers', Building & Common Laborers' Local Union No. 17,
Plaintiff-Appellant,

v.

George M. Brewster & Son,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the orders and judgment of said District Court be and they hereby are affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ A. Daniel Fusaro,
Clerk.